MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE

LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. **35 CENTS PER NUMBER**

NOTE AND COMMENT

THE NATIONAL ARMY ACT AND THE ADMINISTRATION OF THE "DRAFT".—In *Arver* v. *U. S.*, and five similar cases attacking the validity of the so-called National Army Act of May 18, 1917, Public Statutes, No. 12, 65th Congress, c. —, — Stat. —.) the Supreme Court unanimously sustained the validity of the Act so far as attacked. The contention that compulsory military service as provided in the Act is contrary to our fundamental conception of the nature of citizenship, and that such compulsion is repugnant to a free government and in conflict with the guaranties of the Constitution as to individual liberty, the Court disposed of summarily and completely by pointing out that the power given to Congress to raise armies was plenary, subject to no limitations and co-extensive with the same powers possessed by other governments. This part of the argument runs largely upon historical grounds. As the Court says, the arguments of the objectors are clearly untenable. The contention that even though Congress possesses the power to raise armies, its members cannot be sent out of the United States without their consent is due, as the court points out, to the wholly inexcusable confusion between limitations upon the power of Congress over the organized State militia and the power of Congress over such armies as it

may raise under Art. 1, § 8, of the Constitution. The objections raised were obviously flimsy if not wholly insincere and were based upon no sound legal grounds. For this reason, and as the gist of the Court's opinion has been made widely known extended comment here is undesirable. The opinion of the Court with its marginal notes contains important historical references showing that the principle of the Act in question is quite in accord with our own colonial and national experience and policies and with that of other great nations of the world.

On the same day in the case of *Jones* v. *Perkins,* No. 738, the Court affirmed the decision in the similar case in 243 Fed. Rep. 997, in which a writ of habeas corpus, asked for on the ground of the alleged unconstitutionality of the Act, was refused, the court merely referring to its reasoning and decision in the Arver case as disposing of the contention.

On June 14th the Court handed down three other opinions touching the same act of Congress—that which attracted the greatest public attention, at the time of the occurrence involved, being the case of *Emma Goldman and Alexander Berkman* v. *U. S.,* No. 702, 38 Sup. Ct. 166. The Court reduces the numerous contentions of plaintiffs in error to three, of which the first is based upon the alleged unconstitutionality of the Selective Draft Law. Again the Court referred to the Arver case as disposing of this attack. The indictment in the *Goldman & Berkman Case* was under sections of the U. S. Criminal Code and charged the unlawful conspiring together and with others to induce persons who were under duty to register in accordance with the Selective Draft Law to disobey said law by failing to register. The second of the contentions is that as the conspiracy was not successful, no crime was committed. But inasmuch as the indictment charged not only the conspiring but also the doing of overt acts in furtherance of the conspiracy, this was in and of itself essentially and substantively a crime, punishable as such without regard to the success or failure of the criminal act. This had been established in previous decisions. *U. S.* v. *Rabinowich,* 238 U. S. 78; *U. S.* v. *Holte,* 236 U. S. 140; *Joplin Mercantile Co.* v. *U. S.,* 236 U. S. 534. The third contention of plaintiffs in error was comprised of varied assertions that the evidence did not tend to show guilt, a contention which involved inexcusable effort to induce the Supreme Court to invade the province of the jury by passing upon the questions of the credibility and the weight of evidence.

Kramer v. *U. S.,* No. 680, 38 Sup. Ct. 168, was disposed of by decisions in the *Arver* and *Goldman Cases.* In *Ruthenberg, Wagenknecht and Baker* v. *U. S.,* No. 656, 38 Sup. Ct. 168, in addition to points disposed of in the *Arver Case* the plaintiffs in error urged two objections, both of which they should have known and probably did know had been adversely disposed of by the Supreme Court in numerous earlier cases, They asserted that they were Socialists and claimed that the grand and trial jurors were made up exclusively of men of other political parties and of property owners. Precisely the same point in principle had been raised in numerous cases by negro defendants who had been tried by juries composed exclusively of white men. Such a trial had been pronounced constitutional as long ago as

1879. *Va.* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667 and in a long line of cases including *Thomas* v. *Texas,* 212 U. S. 278. The other objections were even more devoid of merit and need not be noticed here.

The validity of certain methods for administering the Selective Draft Law as provided for therein was brought into question in three cases in District Courts of the U. S. In *Ex Parte Hutflis,* 245 Fed. Rep. 798, the District Court for the Western District of N. Y. sustained by implication the provision for the creation of Legal and District Boards to determine all questions of exemption and all claims for excluding or discharging individuals or classes from the draft. The relator, who was unable to read or write English, petitioned for a writ of habeas corpus to release him from the custody of the military authorities on the ground that though he was an alien, through ignorance he had failed to file his claim for exemption within the time limited, and that on learning the requirements of the law, after he had been accepted for the army, he applied to a Local Board for a form upon which to file his claim for exemption, but by mistake was given the wrong blank. It resulted from these facts that the petitioner had no hearing, that his exemption was not passed upon and that as a result he was subject to military authority though exempted by the terms of the Act and, as he claimed, by treaty rights in accordance with the treaty between the United States and Austria-Hungary. The court disposed of the treaty claim by saying that the Selective Draft Law impliedly exempts aliens who are merely denizens of the United States and, moreover, that the Draft Law makes no provision for exemption because of treaty rights. Unquestionably this is sound. A later act of Congress controls or prevails. *Taylor* v. *Morton,* 2 Curt. C. C. 454, Fed. Cas. No. 13,799; *Head Money Cases,* 112 U. S. 580; *Rainey* v. *U. S.* 232 U. S. 310, 58 L. Ed. 617. The court then made what appears to be an equitable disposition of the case by refusing to make the writ absolute at the time, retaining jurisdiction for ten days to allow an application to the Adjutant General for permission to reopen the case before the Local Board.

In *United States ex rel Troiana* v. *Heyburn, Sheriff,* 245 Fed. Rep. 360, the District Court for the Eastern District of Pa. refused to issue the writ of habeas corpus on behalf of relators who are aliens, who sought by such writ in effect to secure a review by the Court of the proceedings of the Local Board which had passed upon their claims for exemption. This Court too sustained the validity of the Selective Draft Law in providing for the Local Board and held that the courts would not review the proceedings of such tribunals except upon a showing of lack of jurisdiction, usurpation of power or arbitrary denial of rights. The court here was upon thoroughly established ground. The principle that administrative tribunals may be given finality of decision and that the courts will not review their proceedings except in the cases mentioned is too well established to require much citation. See, however, *U. S.* v. *Ju Toy,* 198 U. S. 253, 49 L. Ed. 1040; *Kendall* v. *U. S.,* 12 Peters 524; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Butterfield* v. *Stranahan,* 192 U. S. 470, 48 L. Ed. 525; and article by T. R. POWELL, 1 Am. Pol. Sci. Rev. 583.

In *Ex. Parte Blackington*, 245 Fed. Rep. 801, a somewhat shocking case was presented. Relator had enlisted in the National Guard and was afterward drafted into the Federal Service. His petition claims that he was below the required height and had other serious physical disqualifications. He was favorably passed upon for the National Guard Service by a medical officer who was prejudiced against him and who had declared that he would "get even" with petitioner for some prior occurrence. Petitioner knew of these facts at the time he volunteered and made no objection; but after he was drafted into the National Army he consulted other physicians who advised him that he could not safely perform military duty. Meantime he had been examined and passed upon favorably by the Federal medical officers for the National Service and though he endeavored persistently to be discharged therefrom, he failed. The Court dismissed the petition and remanded the petitioner to the military authorities, largely upon the ground that the enlistment was voluntary, that neither the party enlisting nor the military authorities occupied a fiduciary relationship with each other, and that the purpose of the examination is not to give to the applicant assurances that he is physically fit for military service, but only to prevent undesirable men from getting into the army. *U. S.* v. *Cottingham*, 1 Rob. (20 Va.) 615. Perhaps this decision was sound. Perhaps there were facts as brought out upon the petition and hearing in open court which tended to convince the Court that petitioner was endeavoring to shirk. But upon the allegations of the petition as reported by the Court it would seem that here was a case calling for a re-examination, if the law and rules permitted it.

The objections urged against the Draft Law and its administration in all the cases here noted, except the last one, are obviously trivial or worse. An examination of the names of the score or more contestants would cause one to suspect that in some cases at least their obstructing efforts were part of that treacherous hostile propaganda, with which we now know our country has been menacingly infiltrated, both before and since the beginning of the War. The patriotic and clear-visioned pronouncement of our courts in these cases is a cause for sincere appreciation and congratulation.

H. M. B.

INTERSTATE COMMERCE COMMISSION—INTRASTATE RATES.—The marvelous possibilities for collision between State and Nation involved in our dual form of government are nowhere better or more often exhibited than in commerce regulation. We have long been learning the definition of the commerce which the constitution gives Congress power to regulate. It is only recently that we are finding how this power reaches over into purely intrastate business done by a carrier also engaged in interstate commerce. That nearly all rail carriers are now engaged in such business, even when their lines are wholly intrastate, has been often illustrated under the Second Employer's Liability Act. In *Employers' Liability Cases*, 207 U. S. 463, Congress was warned off the State preserves, only to prove that the First Act was wrong, not in its sweep, but in its failure to save to the states in